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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Do children under the age of seventeen have an unconditional and unqualified constitutional right to play coin-operated amusement machines located in a commercial establishment?

2. Is the term "connection with criminal elements" unconstitutionally vague when such language is merely an "in house" directive to the Chief of Police to investigate an applicant's (applicant for a license to operate pinball machines) character and the Chief of Police has no power to issue or deny a license?

3. Are these issues justiciable at the instance of the owner of a commercial amusement enterprise who itself had received a license to operate coin-operated amusement machines?

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REPORTS OF OPINIONS BELOW

1. *Aladdin's Castle, Inc. v. City of Mesquite,* 630 F.2d 1029 (5th Cir. 1980).

2. *Aladdin's Castle, Inc. v. City of Mesquite,* 434 F.Supp. 473 (N.D.Tex 1977).

GROUNDS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

1. *Nature of the Proceeding:* This is a proceeding by Aladdin's Castle, Inc. for injunctive relief prohibiting enforcement of portions of a city ordinance regulating

coin-operated amusement machines and for declaratory relief invalidating other portions of the same ordinance alleging that the challenged portions of the said ordinance are repugnant to the 14th Amendment to the United States Constitution. According to the United States Court of Appeals for the Fifth Circuit, statutory jurisdiction exists under 28 U.S.C. §§1331 and 1332. *Aladdin's Castle, Inc. v. City of Mesquite,* 630 F.2d 1029, 1036 n.12 (5th Cir. 1980)

2. Relevant dates.

(a) Judgment or decree sought to be reviewed was entered on November 17, 1980.

(b) Order denying the motion for rehearing was entered December 15, 1980.

(c) The judgment entered on November 16, 1980, was issued as a mandate on January 6, 1981.

(d) Notice of Appeal was filed in the United States Court of Appeals for the 5th Circuit on March 10, 1981.

3. The statutory provision believed to confer jurisdiction of this Appeal on the Supreme Court of the United States is 28 U.S.C. §1254(2)

CONSTITUTIONAL PROVISIONS AND ORDINANCES

1. The 14th Amendment to the United States Constitution (see appendix).

2. Ordinance No. 1353, Code of the City of Mesquite (see appendix).

STATEMENT OF THE CASE

The City of Mesquite, as do most cities of the State of Texas, regulates the commercial operation of coin-operated amusement machines under its delegated powers as a home

rule city. Aladdin's Castle, Inc., the Appellee, was licensed under the city ordinance to operate such an enterprise.

The Appellee initially sued the city to enjoin the enforcement of the age restriction found in city ordinance No. 1353. Section five of that ordinance makes it unlawful for an owner or operator of coin-operated amusement machines to allow a child under the age of 17 to play such machines if the child is not accompanied by a parent or guardian. The child can play if accompanied by a parent or guardian, and even without a parent or guardian present there is no prohibition of his socializing or associating with others in such a commercial establishment.

The City of Mesquite licenses those who wish to maintain a coin-operated amusement establishment in the city limits. Upon receiving an application for a license, the ordinance directs the Chief of Police, among others, to make a recommendation on the license application. The ordinance directs that his recommendation shall consider, among other things, the applicant's "connections with criminal elements" (if any). By supplemental complaint, Appellee asserted that the quoted language was unconstitutionally vague. Appellant raised the question of the justiciability of the vagueness issue in its Reply To Motion to File Supplemental Complaint.

The trial court awarded Aladdin's Castle, Inc. the declaratory relief it sought on the grounds that the "connection with criminal elements" language was unconstitutionally vague. This holding also resolved the issue of justiciability.

Utilizing the rational relation standard of review, the trial court upheld the qualification created by the ordinance on the right of children to play coin-operated machines unaccompanied by parent or guardian and thus denied the injunctive relief sought by Appellee.

Both sides appealed raising the same issues. The Fifth Circuit affirmed the "vagueness" holding and reversed the denial of injunctive relief saying that the creation of a qualification on the right to play coin-operated amusement machines was unconstitutional under both the "rational relation" and the "strict scrutiny" standards of judicial review. No party contended that the "strict scrutiny" standard was applicable. It was applied by the Fifth Circuit on its own motion and was mentioned for the first time at oral argument.

REASONS FOR PLENARY CONSIDERATION

The Fifth Circuit characterized the right of a child to play coin-operated amusement machines in an arcade as a constitutionally protected "right of social association". Consequently, this case poses the question of the existence (or non-existence) of a constitutional right of association in a social (and therefore non-political) context. It also raises the question of whether such a right (if it exists) applies to with equal force to both adults and children and whether a corporate commercial enterprise has standing to assert that alleged right of individual children (none of whom are parties to the litigation). As the Fifth Circuit said

> The Supreme Court has never ruled directly on the application of the right of association in a social context such as the present one.

630 F.2d 1029 at 1041.

At issue is the scope or extent of the First Amendment guarantee of the freedom of association. The application of this guarantee in a social and economic context involving children presents (as the Fifth Circuit recognized) a case of first impression in this Court.

The ordinance struck down in this case is the type of ordinance this Court has characterized as "social and economic" legislation. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

Plenary consideration of this question is required because, without a clarification by this Court of the reach (into non-political areas) of the right of association, no legislative body can be certain which of its social and economic statutes or ordinances (in the words of the Fifth Circuit) "impermissibly trammel(s) fundamental rights." (630 F.2d at 1041). The Fifth Circuit's recognition of a constitutional "freedom of association in a social context" creates the same kind of uncertainty as to the validity of social and economic legislation as was once created by the recognition of a constitutional "freedom of contract." This is so despite the Fifth Circuit's (at 630 F.2d. 1044) express disapproval of *Lochner v. New York*, 198 U.S. 45 (1905).

As to the void for vagueness holding, in context the challenged language ("connection with criminal elements") is simply a directive from the City Council to its Police Chief as to how to perform his duties. Under the challenged ordinance, the Chief of Police is not authorized to grant or deny a permit. The Council has granted to the City Manager this discretion in the first instance, reserving to themselves the authority to review the City Manager's decision in the event of an appeal by an applicant and has further provided for judicial review of their decision. Any error on the part of the Police Chief due to the allegedly vague language must survive several tiers of review. Neither the trial court nor the court below has considered the language in its context.

If each and every "in house" directive must be worded with the precision of a criminal statute, the day to day

activities of all governments and executive agencies (both state and federal) will be severely hampered.

Appellant asserts there is an urgent (urgent because of the vast implications of the Fifth Circuit holding) need for this Court to articulate the test for distinguishing those non-political, social or economic activities that are within the "penumbra" of the First Amendment (and thus clothed with constitutional immunity from governmental regulation) from those social and economic activities that are not protected by any "constitutional right to social association" (and thus are subject to regulation). Should the Court concur with appellant on the need for an authoritative statement on this point and should the Court conclude review by writ of certiorari would be a more appropriate vehicle for mapping these uncharted waters, appellant asks that this jurisdictional statement be considered, in the alternative, as a writ of certiorari.

Respectfully Submitted,

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APPENDIX

UNITED STATES CONSTITUTION, AMENDMENT 14 § 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ORDINANCE 1353 OF THE CODE OF THE CITY OF MESQUITE

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, REPEALING ORDINANCE NUMBER 1310 OF THE CITY OF MESQUITE AND AMENDING ORDINANCE 1103 OF THE CITY OF MESQUITE BY PROVIDING REGULATION OF AND ESTABLISHING A LICENSE FEE FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS; PROHIBITING THE PLAYING OR OPERATION OF COIN-OPERATED AMUSEMENT MACHINES BY PERSONS UNDER SEVENTEEN (17) YEARS; PROVIDING EXCEPTIONS; PROVIDING FOR REVOCATION OF LICENSE; PROVIDING A RIGHT AND MANNER OF APPEAL; PROVIDING CERTAIN DEFINITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

WHEREAS, coin-operated amusement establishments have a tendency to attract patrons of tender years, and

WHEREAS, the congregation of youthful patrons creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities; and

WHEREAS, it is vital to the safety and welfare of the inhabitants of the City of Mesquite and particularly those of tender years for whom a special duty is imposed upon the governing body to protect, that proper and suitable operators only are licensed to operate coin-operated amusement establishments and that such establishments be regulated to that end; and

WHEREAS, it has been determined that the attraction of such establishment for those under seventeen (17) years of age is detrimental to such persons and to the health and welfare of the inhabitants of the City, generally.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Ordinance Number 1310 of the City of Mesquite passed on the 5th day of April, 1976, is hereby repealed.

SECTION 2. That Ordinance 1103 is hereby amended to read as follows:

SECTION 3. It is hereby declared to be unlawful to own, display or operate coin-operated amusement machines or apparatus in the City without a license issued by the City of Mesquite therefor.

SECTION 4. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

SECTION 5. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

SECTION 6. *License:* Any person desiring to obtain a license for a coin-operated amusement machine may apply to the Assessor Collector of Taxes of the City of Mesquite on a form to be furnished by the City showing the type of machine to be licensed, serial number, location, name of establishment and name of the owner or person in control of such machine together with the name and title of person making the application if other than the owner.

Upon payment of the license fee the Assessor-Collector shall issue a license which shall be valid for such machine for one (1) year.

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

Upon approval by each of the parties and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferable.

The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector

and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

In the event of appeal from the City Manager's decision the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant.

Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V.A.C.S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued.

Upon hearing the Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

For violation of any of the requirements of this ordinance the City Manager may upon three (3) days notice of Licensee revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application.

A person licensed hereunder, by acceptance of such license authorizes the City and its designated personnel to make inspections of the premises, facilities, manner of operation and character of any employee.

The holder of a license hereunder shall comply with all ordinances and requirements of the City of Mesquite and all laws of the State of Texas.

SECTION 7. There is hereby levied a license fee of Ten Dollars ($10.00) for each coin-operated amusement machine and a license fee of One Hundred Dollars ($100.00) for each coin-operated amusement establishment in the City.

The license of a coin-operated amusement establishment shall not exempt the owner or operator from the license fee of individual machines or obediance to any other ordinance of the City of Mesquite, including the prohibition of pool halls.

SECTION 8. *Exceptions:* This ordinance shall not apply to any agency of the United States Government, State of Texas or political subdivision thereof.

Any charitable organization operating or displaying such machines in connection with charitable activities on premises exempt from payment of ad valorem taxes under State law because of such charitable activities shall be exempt from the provisions of this ordinance to such extent.

SECTION 9. *Definitions:* For the purpose of this ordinance the following words and terms are defined as follows:

Coin-Operated Amusement Machine — Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill,

chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding objects or any machine designed for amusement or relaxation. but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides.

Coin-Operated Amusement Establishment — Means any business or commercial establishment or other building or location wherein three (3) or more coin-operated amusement machines are displayed.

Connection With Criminal Elements is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.

A determination by the United States Department of Justice that a party is a member of the "mafia" or "Cosa Nostro" family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facia evidence, so far as the issuance of a license hereunder, that such person has "connections with criminal elements" and

constitute, within the meaning of this ordinance, "criminal elements".

Character as a law abiding citizen shall mean substantially that standard employed by the Supreme Court of the State of Texas in the licensing of attorneys as set forth in Articles 305 and 306, Vernon's Annotated Civil Statutes but expressly excludes conviction by any parties of traffice violations of a Class C misdemeanor grade.

SECTION 10. *Legislative Policy:* It is the policy of the City of Mesquite, in the enforcement and interpretation of this ordinance, to discourage and prohibit the operation, control or interference in the operation of coin-operated amusement facilities by organized crime.

The attraction by the vending industry in general and amusement facilities in particular of criminal elements of our society is recognized and such is determined to be contrary to the welfare of the inhabitants of the City of Mesquite.

SECTION 11. That should any paragraph, sentence, subdivision, clause, phrase, section or provision of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be unconstitutional, illegal or invalid and shall not affect the validity of any other provision of the Code of the City of Mesquite.

SECTION 12. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in Corporation Court shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 13. The fact that the City of Mesquite has no adequate ordinance regulating the operation of coin-operated machines or establishments wherein such machines are located in the City creates an urgency and an emergency and in the preservation of the public health, safety and welfare of its citizens requires that this ordinance shall take effect immediately from and after its passage and the publication of the caption as the law and charter in such cases provide.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 7th day of February, A.D., 1977.